

2009 WL 1392244 (N.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, N.D. California,
San Francisco Division.

Erianna GUERARD, individually and as Special Administrator of
the Estate of Ann Garat, decedent; and Galen Ducey, Plaintiffs,

v.

CNA **FINANCIAL** CORP. sued herein as CNA Insurance Companies, doing business as
Continental Casualty Company, a Corporation; Cammy Wesson-Cohen, an individual;
Suze Orman **Financial** Group, a business entity form unknown, and Suze Orman,
individually, and Long Term Care Group, Inc., and Does 1 Through 10, inclusive, Defendants.

No. 3:09-cv-01801-BZ.
May 1, 2009.

**Defendant Long Term Care Group, Inc.'s Motion to Dismiss and to Strike Plaintiff's
Complaint and Each Cause of Action Thereof Alleged as Against Long Term Care Group, Inc.**

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Judge Hon. [Bernard Zimmerman](#).

[\[FRCP 12\(b\)\(6\), FRCP 12\(f\)\]](#)

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I. INTRODUCTION

This action arises out of a claim that Ann Garat, now deceased, was denied benefits under a longterm care insurance policy that she purchased from CNA **Financial** Corp. (“CNA”). Suit is brought by Erianna Guerard as Special Administrator on behalf of the Estate of Ann Garat (“Garat”) and on behalf of Ann Garat's two surviving children Erianna Guerard and Galen Ducey individually.

Plaintiffs sue CNA, as the issuer of the subject insurance policy under which plaintiffs claim benefits, Long Term Care Group, Inc. (“LTCG”) as the administrator of the policy benefits, and a third set of defendants who were allegedly **financial** advisors or fiduciaries to Garat and advised and assisted Garat in procuring the subject insurance policy.

This is a straightforward case involving benefits denied based on unambiguous provisions of a long-term care insurance policy. The sole basis for suit against LTCG appears to be the allegation that LTCG, in administering claims under the policy on behalf of CNA, denied benefits to plaintiffs based upon LTCG's interpretation of provisions in the policy, specifically the definitions

of an “Eligible Provider of Home Care Benefits” and “Home Care Benefit Exclusions.” Here, Garat's claim for benefits was properly denied because her children were not eligible providers under the terms of her policy. In particular, the policy states:

It does not cover the services provided by members of Your immediate family, which means Your spouse, children, brothers, sisters, or persons related to you by marriage, unless:

1. The family member is a regular employee of an organization which is providing the services; and
2. The organization receives the payment for the services; and
3. The family member receives no compensation other than the normal compensation for employees in his or her job category.

(FAC., Ex. C, p. 13 (emphasis added); FAC ¶40, p. 15:1-7). That provision is clear and unambiguous, and by itself compels dismissal of plaintiffs' Complaint and each cause of action asserted as against LTCG.

The only three causes of action asserted as against LTCG (all of which LTCG moves to strike) are:

- (1) the fifth cause of action for fraud,
- (2) the sixth cause of action for **elder abuse**, and
- (3) the seventh cause of action for unfair business practices.

None of these causes of actions state a valid claim as against LTCG and each should be dismissed for the reasons set forth below pursuant to Federal Rules of Civil Procedure (“FRCP”) 12(b)(6) in conjunction with [FRCP 9\(b\)](#). For all of these reasons, plaintiffs' Complaint should be dismissed as a matter of law.

In addition, plaintiffs allege the following prayers for damages which LTCG moves to strike:

- (1) for punitive damages under [California Civil Code \(“CC”\) §3294](#),
- (2) for compensatory and emotional distress damages and punitive damages for **financial elder abuse** under [California Welfare & Institutions Code \(“W&IC”\) §§15610.30 & 15657.5](#),
- (3) for compensatory damages/non-economic damages, attorney fees and punitive damages) for fraud which are barred by California Code of Civil Procedure (“CCP”) [§377.34](#); and
- (4) for restitution and injunctive relief under [California Business & Professions Code \(“B&PC”\) §17200](#).

Each of these prayers for damages are subject to being stricken pursuant to [FRCP 12\(f\)](#).

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Suit was originally filed on August 26, 2008 in the Superior Court for the County of Alameda, State of California. Thereafter the operative First Amended Complaint (“FAC”) was filed on March 16, 2009 and served on defendant LTCG on March 25, 2009.

A removal petition was filed April 24, 2009. This motion to dismiss and to strike pursuant to [FRCP Rule 12\(b\)\(6\)](#) and [12\(f\)](#) timely follows within five court days of the filing of the removal petition.

B. PLAINTIFF'S ALLEGATIONS

1. THE POLICY

Plaintiffs allege that in 1999 Garat purchased a long term care policy from CNA. (FAC ¶2 and Ex. C to FAC.) Plaintiffs allege that Garat relied on a CNA marketing brochure regarding who was an eligible care provider under the policy. (FAC ¶ 2.) Plaintiffs further allege that Garat purchased the specific CNA policy because of her belief that family members not living with her could be paid directly. (FAC ¶18.)

The policy is both attached as Exhibit C to the FAC and incorporated by reference within the four corners of the pleading as well as directly quoted in pertinent part within the FAC. (FAC ¶17 and Ex. C to FAC.) It is declared that the policy contains the following relevant language:

ELIGIBLE PROVIDERS OF HOME CARE BENEFITS

Home Health Care, Personal Care, Homemaker Services, and Hospice Services must be provided by a Home Health Care Provider or an Independent Caregiver, as defined below.

WHAT IS A HOME HEALTH CARE PROVIDER

An entity which provides home care or Hospice Services and:

- i. Has an agreement as a provider of home care services or Hospice Services under the Medicare program; or
- ii. Is licensed or accredited by state law as a home health care agency or hospice, if such licensing or accreditation is required by the state in which the care is received; or
- iii. Is a licensed therapist, a registered nurse (R.N.), a license practical nurse (L.P.N.), or a licensed vocational nurse (L.V.N.) operating within the scope of his or her license.

A Home Health Care Provider cannot be a member of Your immediate family living with You.

WHAT IS AN INDEPENDENT CAREGIVER

An individual who provides home care or Hospice Services and:

- I. Who holds an active State licensure or certificate appropriate to the level of care being provided and works independent of a licensed home health care agency. The license or certification must be in the State where care will be provided; or
- II. Is an individual who has been chosen by You and has been qualified under the Independent Caregiver Certification Benefit; or
- III. Is an individual providing a level of service that does not require certification or licensure.

This policy will not pay benefits for any care or services which are provided without charge in the absence of insurance.

An Independent Caregiver cannot be a member of Your immediate family living with You.

The Independent Caregiver will be required to provide:

- 1 Proof of certification or licensure; if it is required by the level of services being provided; and
2. Daily records of the care or service provided including the daily charges.
3. We will not limit or exclude benefits by requiring that the provision of services under the Home Care Benefit be at a level of certification or licensure greater than that required by the eligible service or by limiting benefits to services provided by Medicare-certified agencies or providers.

HOME CARE BENEFIT EXCLUSIONS

1. The family member is a regular employee of an organization which is providing the services; and
2. The organization received the payment for the services; and
3. The family member receives no compensation other than the normal compensation for employees in his or her job capacity.

(FAC, ¶¶17, 39, Ex. C to FAC, pp. 12-13.)

The policy provided various specified benefits, including Home Care Benefits. (FAC, Ex. C, pp. 10-15.) The very first page of Garat's policy provided her with a "30-Day Review Period" during which to examine the policy. (FAC, Ex. C, p. 1.) If she determined for any reason the "policy [did] not meet [her] insurance needs", she was directed to return the policy within 30 days for a full refund. (FAC, Ex. C, p. 1.) The first page of the policy also stated in bold type: "You are advised to review carefully all policy limitations." (FAC, Ex. C, p. 1.)

Under the policy section entitled "Home Care Benefits", CNA agreed to provide benefits for certain home care services as specified in the policy. (FAC, Ex. C, pp. 11-12.) "Home Health Care" benefits had to be provided by a "Home Health Care Provider or an Independent Caregiver", as defined in the Policy. (FAC, Ex. C, p. 12.) In addition, the "Home Care Benefit Exclusions" provision made clear that such benefits could not be provided by family members, except in certain specified circumstances: "It [*i.e.*, the Home Care Benefit] does not cover services provided by members of Your immediate family, which means Your spouse, children, brothers, sisters, or persons related to you by marriage, unless: (i) the family member is a regular employee of an organization which is providing the services; (ii) the organization receives the payment for the services; and (iii) the family member receives no compensation other than the normal compensation for employees in his or her job category." (FAC, Ex. C, p. 13.) Accordingly, benefits were excluded for the services of her family members Erianna and Galen as they did not meet the exception requirement to the exclusion for family members.

2. ALLEGED SEQUENCE OF EVENTS RE: GARAT

The following chronological sequence of events are alleged in the FAC to have occurred after the policy was purchased by Garat:

- In 2001 Garat was diagnosed with [cancer](#). (FAC ¶4.)
- Beginning in January 2002, Garat needed assistance performing ADL's. (FAC ¶45.)
- Beginning in Fall 2004, Garat required monitoring and skilled nursing care. (FAC ¶43.)
- In March 2006, Garat first presented a claim for benefits. (FAC ¶45.)

- On June 14, 2006, Garat was advised that CNA was evaluating the claim, (FAC ¶46.)
- On August 26, 2006, Garat was advised that Galen was not an eligible caregiver under the policy based upon the exclusion. (FAC ¶49.)
- On May 30, 2007, Garat passed away. (FAC ¶4.)

3. SPECIFIC ALLEGATIONS REGARDING LTCG

Plaintiffs allege that LTCG administered Garat's claim for benefits under the policy issued by CNA. (FAC ¶¶4, 12.) However, the only act that is factually pled as against LTCG is that LTCG denied benefits to Garat based upon provisions in the policy which set forth the definitions of an “Eligible Provider of Home Care Benefits” and “Home Care Benefit Exclusions”.

The language under which the claim for benefits is subject to being denied is clear and unambiguous. Plaintiffs' breach of contract claim fails because the policy unambiguously excludes coverage for services provided by family members. Plaintiffs' breach of the implied covenant claim fails because no benefits were due or unreasonably withheld as a matter of law. Plaintiffs' fraud-based claims fail because they are contradicted by plaintiffs' own allegations: Plaintiffs concede the policy materials stated that services provided by family members were not covered unless the family members worked for an agency. No actionable misrepresentations are alleged to have been made by LTCG.

Accordingly, as set forth below the allegations do not state valid causes of action for fraud, **elder abuse** or unfair competition against LTCG.

III. ARGUMENT

A. STANDARD FOR **FRCP 12(b)(6)** MOTION TO DISMISS

“A *Federal Rule of Civil Procedure 12(b)(6)* motion to dismiss tests the sufficiency of the complaint. Dismissal pursuant to *Rule 12(b)(6)* is appropriate if the plaintiff is unable to articulate ‘enough facts to state a claim to relief that is plausible on its face.’ ” *Labrador v Seattle Mortgage Co.*, 2008 U.S. Dist. LEXIS 90968, p. 5 (USDC-NDCA).

To survive a motion to dismiss, a plaintiff must allege facts that are enough to raise her right to relief “above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929, 940 (2007). A plaintiffs' obligation to demonstrate her entitlement to relief “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do”. *Id.* Rather, a plaintiff must allege “enough facts to state a claim to relief that is plausible on its face”, not just conceivable. *Id.*; see *In re Dynamic Random Access Memory Antitrust Litig.*, 536 F.Supp.2d 1129, 1134 (N.D. Cal. 2008) (citing *Twombly* standard).

If a plaintiff cannot allege any facts in support of a claim that would entitle her to relief, the complaint must be dismissed under *Rule 12(b)(6)*. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). A *Rule 12(b)(6)* dismissal may be based on a plaintiff's “failure to allege a cognizable legal theory or the failure to allege sufficient facts under a cognizable legal theory”. *Id.* “Unreasonable inferences or conclusory legal allegations cast in the form of factual allegations, however, are insufficient to defeat a motion to dismiss.” *Labrador, supra*, at page 5, citing, *W. Mining Council v Watt*, 643 F.2d 618 (9th Cir. 1981). As demonstrated below, plaintiffs' FAC should be dismissed as a matter of law.

1. PLAINTIFFS' FIFTH CAUSE OF ACTION FOR FRAUD AND CONSPIRACY AGAINST LTCG IS SUBJECT TO DISMISSAL BECAUSE PLAINTIFFS FAIL TO ALLEGE THE REQUIRED ELEMENTS OF A FRAUD CAUSE OF ACTION UNDER CALIFORNIA LAW AND FRCP 9(b)

Under California law, a plaintiff must prove five elements to prevail on a fraud claim: “(1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage.”. *Conroy v. Regents of University of California*, Cal.Rptr.3d -, Case Nos. 153002, 2009 WL 902373, *7 (Cal. Apr. 6, 2009).

FRCP (9)(b) governs pleading requirements for fraud in Federal Court diversity actions. *Hayduk v Lanna*, 775 F.2d 441,443 (1st Cir. 1985). FRCP 9(b) requires that: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” Plaintiffs cannot satisfy any of the foregoing requirement as against LTCG as a matter of law.¹

LTCG is merely alleged to have interpreted the policy language so as to deny the claim for benefits submitted by Garat. LTCG is not alleged to have participated in the marketing of the policy. Therefore, no representations about coverage could have been made by LTCG to Garat at the time she purchased the policy or to induce her to do so. Nor did LTCG join in alleged misstatements or misrepresentations made by others in some type of concert of action or conspiracy because there were no actionable misrepresentations made by others that are properly alleged.

a. There Were No Misstatements.

“The complaint must detail ‘what is false or misleading about a statement, and why it is false.’” *The Segal Company v Amazon.com*, 280 F.Supp.2d 1229,1231 (2003 U.S. Dist. LEXIS 20639). In addition, a statement must be false to be fraudulent. *Jenkins v. Commonwealth Land Title Ins. Co.*, 95 F.3d 791,796 (9th Cir. 1996), citing *Decker v. GlenFed, Inc.* (*In re GlenFed, Inc. Securities Litigation*), 42 F.3d 1541,1548 (9th Cir. 1994) (*en banc*) (“[t]he statement in question must be false to be fraudulent”). It is apparent on the face of the FAC that there were no misrepresentations made by LTCG, who only made an interpretation of policy provisions.

The marketing brochure allegedly relied on by Garat is not alleged to have been written or promulgated by LTCG. However, even if that were alleged, the brochure does not contain any misrepresentations. It provides general descriptions of benefits available under the Preferred Solution Series of policies. While it does not list all the exclusions found in the policy form, the final page of the brochure states: “This brochure is only a general description of the coverage. Only the insurance policy can give the actual terms, coverage, limits, conditions and exclusions. Every plan may not be available in every state.” (FAC, Ex. D, p. 35.) Thus, the information provided in the marketing brochure was not inconsistent with the policy. Nowhere does the brochure state that family members could provide covered services under the policy, as plaintiff alleges. (FAC ¶30.) “Where an exhibit to a pleading is inconsistent with the pleading, the exhibit controls.” *Gamble v. GMAC Mortgage Corp.*, No. C-08-05532 RMW, 2009 WL 400359, *3 (Feb. 18,2009). The marketing brochure cannot form the basis for a fraud-based claim against LTCG as a matter of law.

As plaintiffs concede, the Outline of Coverage also does not contain any misrepresentations. To the contrary, it correctly states that family members could not provide covered services, except in certain circumstances. (FAC ¶34.) The cover page of the Outline of Coverage states its purpose is to provide a “very brief description of the important features of the policy.” (FAC, Ex. F, p. 1.) It further states the Outline is not an insurance contract, that only the policy contains governing contractual provisions, and that therefore, the policy should be read carefully. In addition, the section boldened and titled “LIMITATIONS AND EXCLUSIONS” correctly states that all home care services from immediate family members are excluded except in circumstances not present here. The Outline of Coverage cannot form the basis for a fraud-based claim as a matter of law.

Finally, the policy itself contains no misrepresentations, as plaintiffs seem to allege. Its cover page advises, in bold print, that the policyholder should carefully review all policy limitations. (FAC, Ex. C,p. 1.) It advises the policy “may not cover all of the costs associated with long-term care incurred... during-the period of coverage”, and explicitly provides a 30-day review period during which Garat could review the policy and, if she was not satisfied for any reason, return the policy and have her premiums refunded. *Id.* As noted above, in the boldened section titled “HOME CARE BENEFIT EXCLUSIONS”, the policy expressly provided that services provided by immediate family members are not covered except in circumstances not present here. This was the very same exclusion found in the “LIMITATIONS AND EXCLUSIONS” section of the Outline of Coverage. Plaintiffs admit as much. (FAC ¶¶40-41.) There is no misrepresentation as a matter of law.

b. Plaintiffs Cannot Allege Reliance

Fraud, intentional misrepresentation, and deceit claims require reliance on the part of the plaintiff. *Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal. App.3d 1324 (1986) (essential allegations for action in fraud or deceit are false representation as to material fact, knowledge of its falsity, intent to defraud, justifiable reliance, and resulting damage; absence of any required element precludes recovery); *OM Principal Opportunities Fund v. CIBC World Market Corp.*, 157 Cal. App.4th 835, 863 (2007) (to demonstrate justifiable reliance, a plaintiff must show: That he or she actually relied on the defendant's misrepresentations, and that he or she was reasonable in doing so); see also *Croeni v. Goldstein*, 21 Cal.App.4th 754 (1994).

Here, plaintiffs could not have justifiably relied on anything that was said by LTCG during the purchasing process because no representations are alleged to have been made during that period of time. In addition, there can be no conspiracy or concert of action because whatever was said, the unambiguous policy terms should have alerted her immediately that services covered by family members would not be covered under her policy. Plaintiffs are bound by the clear and conspicuous provisions in the policy even if Garat “did not read or understand them”. *Hadland v. NN Investors Life Insurance Co., Inc.*, 24 Cal. App. 4th 1578, 1586 (1994); also *Aetna Casualty & Surety Co. v. Richmond*, 76 Cal.App.3d 645, 652 (1977) (“receipt of a policy and its acceptance by the insured without an objection binds the insured as well as the insurer and he cannot thereafter complain that he did not read it or know its terms. It is a duty of the insured to read his policy.”); *Malcom v. Farmers New World Life Ins. Co.*, 4 Cal.App.4th 296,304, n.6(1992)(“A reasonable person will read the coverage provisions of an insurance policy to ascertain the scope of what is covered”).

Further, where - as here - a policy brochure or outline places a policyholder on notice that the policy itself contains the terms and limitations of coverage, the reliance element cannot be satisfied as a matter of law. *Hackethal v. National Casualty Co.* 189 Cal.App.3d 1102 (1987) (fraud claim brought based on allegations of misrepresentations by agent, agent's brochure outlining policy, and policy, brochure outlining policy placed policyholder on notice to read policy, no justifiable reliance).

Here, the materials provided to Garat concerning the policy were unambiguous. The Outline advised her that the terms and limitations were set forth in the policy and that she should read the policy carefully. The policy itself warned Garat that it might not cover “all costs associated with long-term care” and once again, that she should “carefully review all policy limitations”. Further, as plaintiffs concede, both the Outline and the policy advised that services provided by family members were only covered in certain circumstances not present here. On the basis of these allegations, reliance cannot be alleged as a matter of law.

c. Plaintiffs Have Not Otherwise Stated Any Fraud Claim With Particularity

To adequately plead fraud with particularity, a plaintiff must allege “an account of the time, place, and content of the false representations, as well as the identities of the parties to the misrepresentations”. *Swartz v. KPMG LLP*, 476 F.3d 756,763 (9th Cir. 2007). Plaintiffs have not done so here. Other than the facially deficient allegations regarding the marketing brochure, outline of coverage and the policy, plaintiffs have not identified the particulars of any other statement plaintiffs believe is false.

d. Plaintiffs Have Not Adequately Alleged Conspiracy.

Plaintiffs have failed to adequately allege any claim for conspiracy with respect to fraud. Under California law, “to state a cause of action based upon a conspiracy theory the plaintiff must allege the formation and operation of the conspiracy, the wrongful act or acts done pursuant to it, and the damage resulting from such acts. In making such allegations bare legal conclusions, inferences, generalities, presumptions, and conclusions are insufficient.” *State ex rd. Metz v. CCC Information Services, Inc.*, 149 Cal.App.4th 402, 419 (2007). Plaintiffs' FAC contains no allegations whatsoever concerning any alleged conspiratorial agreement or operation. All plaintiffs allege is that the other defendants “substantially assisted, encouraged, aided and abetted”. (FAC ¶¶ 94-95.) Such conclusory allegations do not support a conspiracy claim under California law.

Plaintiffs' purported conspiracy allegations are also barred as a matter of law by California's agent's immunity rule. Under that rule, “[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage”. *Reynolds v. Bemen*, 36 Cal.4th 1075, 1090 (2005). Because the only allegedly conspiring parties here are alleged agents, plaintiffs' conspiracy claim fails for this additional reason.

2. PLAINTIFFS' SIXTH CAUSE OF ACTION FOR ELDER ABUSE AGAINST LTCG MUST BE DISMISSED

Plaintiffs' cause of action for **elder abuse** is a statutory cause of action which is stated to be made pursuant to [W&IC §15610.30](#) for **financial abuse** only and requests penalties under [W&IC §15657.5](#) only. Plaintiffs fail to plead facts sufficient to state a cause of action for **financial** elder **abuse**.²

[W&IC § 15610.30](#) provides as follows:

(a) ‘**Financial Abuse**’ of an **elder** or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assist in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult by undue influence, as defined in [Section 1575 of the Civil Code](#).

(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains the property and the person or entity knew or would have known that this conduct is likely to be harmful to the **elder** or dependent adult.

(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining real or personal property when an **elder** or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of and **elder** or dependant adult.

(d) For purposes of this section, “representative” means a person or entity that is either of the following:

(1) A conservator, trustee, or other representative of the estate of an **elder** or dependent adult.

(2) An attorney in fact of an **elder** or dependent adult who acts within the authority of the power of attorney.

Here, there is absolutely no allegation that LTCG took, secreted, appropriated, obtained or retained (or assisted another in doing so) real or personal property of Garat for a wrongful use or with intent to defraud.

What plaintiffs do allege is that Garat had a right to obtain the benefits under her policy. As set forth above, the determination that no benefits were due under the policy due to the definitions and exclusions within the policies is not **financial elder abuse**. LTCG did not receive or obtain any real or personal property of Garat. LTCG did not take, secrete or appropriate any real or personal property of Garat. LTCG is not alleged to have engaged in any conduct violative of the statute. LTCG did nothing more than administer Garat's policy and respond to a claim for benefits under the policy. That LTCG interpreted the clear language of the policy in such a way that it was determined that benefits were not owed to by the insurer CNA to Garat does not constitute **financial elder abuse**. Accordingly, this cause of action is subject to dismissal.

3. PLAINTIFFS' SEVENTH CAUSE OF ACTION FOR UNFAIR COMPETITION UNDER B&PC §17200 AGAINST LTCG MUST BE DISMISSED

Plaintiffs allege that the conduct of LTCG is unlawful, unfair and fraudulent within the meaning of the Unfair Competition Law. (FAC ¶107.)³ However, those conclusory allegations are unsupported by factual allegations.

It is clear from the FAC that there are no allegations that LTCG made any representations to Garat (or anyone else) regarding purchase of the policy, made no representation about coverages in the policy or benefits before the policy was purchased and issued, did not author the policy, and did not issue the policy. All that is alleged is that LTCG denied plaintiffs' claim for benefits based upon provisions in the policy definitions of "Eligible Provider of Home Care Benefits" and "Home Care Benefit Exclusions".

The conduct of LTCG is not unlawful. LTCG is NOT the insurer. The specific provisions cited by plaintiffs as being violated, California Insurance Code ("CIC") §§780 and 790.3, are not applicable to LTCG,⁴ and cannot form the basis of a UCL cause of action against LTCG.

The allegation that any practice by LTCG is unfair, immoral or somehow unethical (FAC ¶107) is not supported by any factual allegations. As set forth above, LTCG simply interpreted the policy language which is clear and unambiguous and correct. Interpreting the terms of the policy in administering it is not an unfair practice. In addition, even if this Court were to determine that LTCG's determination of the policy language is wrong, that in itself does not establish that the action of LTCG was unlawful, fraudulent or unfair. *Cranshaw v Mony Life Ins. Co*, 2004 U.S. Dist. LEXIS 9883, pp. 67-71 (USDC-SDCA).

There is also no merit to the fraud allegation as set forth in detail above with respect to the fifth cause of action for fraud, and the arguments under section III.A.1.a - d are hereby incorporated as if fully set forth herein. The meaning to be ascribed to an insurance policy, as with any contract, is a question of law. *Levy v State Farm Mutual Automobile Insurance Co.*, 150 Cal.App.4th 1 (2007). Plaintiffs may disagree with LTCG's interpretation and application of the policy language; however, the policy language is clear that the claim for home care benefits made by Garat are precisely within the Home Care Benefits Exclusion. In addition, even if this Court were to determine that LTCG's determination of the policy language was wrong, that in itself does not establish that the action of LTCG was unlawful, fraudulent or unfair. *Cranshaw v Mony Life Ins. Co*, 2004 U.S. Dist. LEXIS 9883, page 67-71 (USDC-SDCA). Accordingly, the interpretation of the terms by LTCG is not fraudulent and cannot be the basis for a UCL claim.

B. AUTHORITY FOR MOTION TO STRIKE PURSUANT TO FRCP 12(F)

Before responding to a pleading, a party may move to strike any “redundant, immaterial, impertinent or scandalous matter”. [FRCP 12\(f\)](#). Here, plaintiffs allege prayers for damages which are immaterial as they are not recoverable based upon the factual allegations pled and should be stricken.

1. PLAINTIFFS ARE NOT ENTITLED TO PUNITIVE DAMAGES UNDER [CIVIL CODE §3294](#) AND THIS COURT SHOULD STRIKE THAT PRAYER

Plaintiffs pray for “punitive and exemplary damages against all defendants” (FAC, prayer, ¶5(b), page 39, line 26), and “For punitive damages for violation of [Civil Code \(‘CC’\) §3294](#), in a sum or sums in excess of the jurisdictional minimum of this court.” (FAC, prayer ¶6(c), p. 40:9-11.) These prayers as against LTCG must be stricken as plaintiffs fail to allege grounds to recover such damages against LTCG.

[California Civil Code § 3294](#) states that:

(a) In an action for the breach of an obligation not arising from a contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advanced knowledge of the unfitness of the employee and employed him or her with conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advanced knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on a part of an officer, director, or managing agent of the corporation.

(1) “Malice” means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) “Fraud” means an intentional misrepresentation, deceit or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or other-wise causing injury.

As set forth in the statute, the general rule is that punitive damages are generally not recoverable in cases arising out of a breach of contract. Although courts have recognized an exception to this general proscription in the insurance context, they are only recoverable against the insurer when there is also a breach of the covenant of good faith and fair dealing. *Cranshaw v Mony Life Ins. Co.*, 2004 U.S. Dist. LEXIS 9883, page 71-74 (USDC-SDCA)(“Punitive damages maybe awarded when the insurer breaches the covenant of good faith and fair dealing and is ‘guilty of oppression, fraud or malice.’ ” *Id.*, at 73, citing, *Lunsford v American Guarantee Liability Ins. Co.*, 18 F.3d 653,656 (9th Cir. 1994).)

In this case, LTCG is not the insurer and therefore cannot be found to have violated the covenant of good faith and fair dealing with respect to the insurance contract. Based on the foregoing alone the punitive damages allegation as against LTCG must be dismissed.

Nor was the covenant of good faith or fair dealing violated at all in this case by any defendant and there are insufficient allegations to establish a violation of the covenant of good faith and fair dealing by any party defendant. To establish a claim for breach of the implied covenant of good faith, a plaintiff must demonstrate that: (i) coverage was due; (ii) benefits due under the policy were withheld; and (3) the reason for withholding benefits was unreasonable and without proper cause. [Love v. Fire](#)

Ins. Exchange, 221 Cal.App.3d 1136, 1151 (1990). There is no bad faith where there “exists a genuine issue as to the insurer’s liability under California law”. *Fraley v. Allstate Ins. Co.*, 81 Cal.App.4th 1282, 1292 (2000). None of these elements are alleged or can be alleged here as a matter of law.

At the threshold, there can be no breach of the implied covenant of good faith and fair dealing because, as demonstrated above, no benefits were due under Ms. Garat’s policy. *Love, supra*, at 1153 (“[w]here benefits are withheld for proper cause, there is no breach of the implied covenant.”) In addition, even if benefits were due (and they were not), it certainly cannot be said that LTCG’s handling of Ms. Garat’s claims was unreasonable. *Cooper v. Travelers Indem. Co. of Illinois*, No. C-0 1 -2400-VRW, 2002 WL 32775680 (N.D. Cal. Nov. 4, 2002) (“test for bad faith is whether the insurer was unreasonable in denying coverage”), citing *Opsal v. United Services Auto. Assn.*, 2 Cal.App.4th 1197, 1206 (1991); *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 995 (9th Cir. 2001). “If an insurer denies coverage because of a genuine dispute over coverage, the insurer does not act in bad faith.” *Id.*, citing *Fraley, supra*, at 1282, 1292; *Chateau Chamberay Homeowners Ass’n v. Associated International Ins. Co.*, 90 Cal.App.4th 335, 347-48 (2001); *Everett v. State Farm General Ins. Co.*, 162 Cal. App.4th 649, 657 (2008) (where insurer paid all benefits to which insured was entitled under her policy, there was no breach of contract and no breach of the implied covenant).

However, even violating the duty of good faith and fair dealing is itself insufficient to justify an award of punitive damages. *Id.*, at 73 - 74, citing, *Silberg v California Life Ins. Co.*, 11 Cal.3d 452, 462-463 (1974). In addition, plaintiffs fail to allege any specific conduct that is malicious, oppressive or fraudulent and which conduct had the required managing agent ratification. Clearly, plaintiffs have failed to allege facts sufficient to meet the stringent requirements of CC §3294 set forth above and dismissal of the punitive damages claim is merited.

2. PLAINTIFFS’ CLAIMS FOR FINANCIAL ELDER ABUSE DAMAGES NOT AUTHORIZED BY W&IC §15657.5 MUST BE STRICKEN

Within the cause of action for financial elder abuse, plaintiffs also throw in conclusory allegations of physical abuse and neglect without stating by what action such conduct occurred and requests damages not authorized by the financial elder abuse statutes. W&IC §§15610.30 and 15657.5. Plaintiffs allege Garat suffered “severe and enduring emotional distress” (FAC ¶102) and “suffered injury, loss and damage... entitling to an award of compensatory general... and non-economic damages for Ann’s mental suffering, emotional distress ... including but not limited to non-economic damages for Ann’s mental suffering, emotional distress...”. (FAC ¶103.)

WIC § 15657.5 reads as follows:

(a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney’s fees and costs. The term “costs” includes, but it not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney’s fees and costs set forth in subdivision (a), compensatory damages, and all other remedies otherwise provided by law, the limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any punitive damages may be imposed against an employer found liable for financial abuse as defined in Section 15610.30. This subdivision shall not apply to the recovery of compensatory damages or attorney’s fees and costs.

(d) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.

Physical and mental **abuse** are not actionable under that statute and the elements of damages alleged are neither authorized nor recoverable under the statutes.⁵ Accordingly, the prayers for recovery of compensatory damages, mental suffering, and emotional distress for **financial elder abuse** must be stricken.

In addition, although [W&IC §15657.5](#) does provide for the recovery of punitive damages, the standard set forth for the recovery of punitive damages is set forth in [CC §3294](#); accordingly, as set forth immediately above in Section III.B.1., because plaintiffs fail to allege any facts which meet the stringent requirements of [CC §3294](#) for the recovery of punitive damages, the alleged claim for punitive damages for violation of [W&IC § 15610.30](#) must be stricken as well.

3. PLAINTIFFS' CLAIM FOR COMPENSATORY DAMAGES/NON-ECONOMIC DAMAGES FOR FRAUD ARE BARRED BY [CCP §377.34](#) AND NO STATUTE AUTHORIZES ATTORNEY FEES IN FRAUD ACTIONS, THUS THIS COURT SHOULD STRIKE SUCH PRAYERS

Here a claim is made for “compensatory... damages... including non-economic emotional distress damages and attorney fees according to proof.” (FAC, prayer ¶5(a), p. 39:22-25.)

[California Code of Civil Procedure \(“CCP”\) §377.34](#) bars the recovery of general or non-economic damages once a person passes away even when suit is continued or brought by the decedent's representatives or successors-in-interest suing on behalf of the decedent or the estate of decedent. There is no exception for fraud. Accordingly, plaintiffs' claim for such damages on behalf of Garat must be stricken. With respect to Erianna and Galen, as set forth above, these plaintiffs do not have standing to assert the fraud cause of action and therefore they cannot recover such damages.

There is no statute that authorizes the recovery of attorney fees for fraud in California. Accordingly, the claim for attorney fees set forth above on the fifth cause of action must be stricken.

4. PLAINTIFFS ARE NOT ENTITLED TO RESTITUTION OR INJUNCTIVE RELIEF UNDER [B&PC §17200](#) AND THIS COURT SHOULD STRIKE SUCH PRAYERS FOR RELIEF

a. Basis To Strike Claims For Restitution As Against LTCG With Respect To The [B&PC §17200](#) Claim

Plaintiffs have failed to allege facts essential to support this claim as against LTCG. There is no allegation of Garat suffering actual economic damages in any amount as a result of an unfair business practice by LTCG. It is also not alleged that monies were paid to LTCG or in what amount. In addition, as there are no facts pled that monies specifically were unfairly or unlawfully obtained by LTCG from Garat, this prayer against LTCG must fall. [Cortez v Purolator Air Filtration Products, Inc.](#), 23 Cal.4th 163, 172 (2000).

b. Basis To Strike Prayer For Injunctive Relief With Respect To The [B&PC §17200](#) Claim

Plaintiffs have failed to allege facts essential to support this prayer. The unfair competition law as set forth in [B&PC §17200](#), *et. seq.* “has not altered the nature of injunctive relief, which requires a threat that the misconduct to be enjoined is likely to be repeated in the future”. [Madrid v. Perot Systems Corporation](#), 130 Cal.App.4th 440, 465 (2005). “Injunctive relief has no application to wrongs which have been completed, absent a showing that past violations will probably recur.” *Id.*, at 465. When “the assertedly wrongful practice has ended long before the action is filed, its requested termination is a rather empty prayer.” *Id.*, at 465.

Pursuant to [CCP §526](#), injunctions may be granted only in certain cases, none of which are applicable here. Specifically, [CCP §526](#) reads as follows:

(a) An injunction may be granted in the following cases:

- (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
- (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action.
- (3) When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual.
- (4) When pecuniary compensation would not afford to adequate relief.
- (5) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief.
- (6) Where the restraint is necessary to prevent a multiplicity of judicial proceedings.
- (7) Where the obligation arises from a trust.

([CCP §526\(a\)](#).)

In this case, none of the foregoing grounds for which an injunction may be granted are present. It is unclear what injunctive relief is being sought against LTCG. It would appear that plaintiffs ask this Court to direct that LTCG administer policies properly under the terms of the policy. As set forth above, it is clear that in fact LTCG has properly interpreted the policy issued by CNA to Garat. Accordingly, there is no conduct to enjoin. To the extent any person in the future believes that benefits may be due under a policy they can make a claim and should they believe benefits are improperly denied, individual judicial action to seek judicial relief on a case by case basis is appropriate. Plaintiffs have no right or standing to ask this Court to issue an order that LTCG be enjoined from administering policies in the manner in which they do. Clearly, plaintiffs' prayer for injunction lacks merit; accordingly, this Court should strike this claim for an injunction.

Although California law specifically provides for injunctive relief to enjoin ongoing acts of unfair competition under [B&PC § 17200](#), injunctive relief under [B&PC § 17203](#) has no application to completed wrongs absent a showing of threatened future harm or continuing violation. *Sun Microsystems, Inc. v. Microsoft Corp.*, 87 F.Supp.2d 992 (N.D. Cal. 2000). Plaintiffs' prayer for injunctive relief is without merit because plaintiffs have not alleged that an unfair business practice is ongoing or likely to occur in the future. The purpose of an injunction is to prevent future harm to an applicant by ordering a defendant to refrain from performing a particular act; therefore, injunctive relief lies only to prevent threatened future injury and has no application to wrongs that have been completed already. *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal.App.4th 1228 (2005). Here there clearly is none and therefore the prayer for injunctive relief is improper and should be stricken.

IV. CONCLUSION

For the foregoing reasons moving party defendant LTCG hereby respectfully requests that this Court grant this motion to dismiss and to strike pursuant to [FRCP Rules 12\(b\)\(6\)](#) and [12\(f\)](#) without leave to amend.

Dated: May 1, 2009

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: /s/

REUBEN B. JACOBSON

Attorneys for Defendant

LONG TERM CARE GROUP, INC.

Footnotes

- 1 It should be noted that both Erianna and Galen lack standing to even allege this cause of action as they were not the purchaser of the policy nor an insured under the policy and cannot claim they were fraudulently induced.
- 2 Within the cause of action for **financial elder abuse**, plaintiffs also throw in conclusory allegations of physical **abuse** and neglect without stating by what action such conduct occurred. These **elder abuse** allegations of physical and mental **abuse** are not actionable under that statute and damages for such not recoverable under [W&IC § 15610.30](#). In addition, plaintiffs further fail to plead facts which state a cause of action for physical or mental **elder abuse** or would give rise to the prayed for “award of compensatory general... and non-economic damages for Ann's mental suffering, emotional distress ...”. (FAC ¶103.) Those enhanced damage claims are not authorized by this statutory cause of action.
- 3 It should be noted that both Erianna and Galen lack standing under California's Proposition 64 to even allege this cause of action as they were not the purchaser of the policy nor an insured under the policy.
- 4 In addition, an alleged violation of CIC §790.3 as a matter of law cannot form the basis of a UCL claim under [B&P Code § 17200](#). (See, *Moradi-Shalal v. Fireman's Fund* 46 Cal.3d 287 (1988); *Mercado v Allstate Inc. Co.*, 340 F.3d 824 (9th Cir. 2003).)
- 5 To the extent the **elder** may make a separate claim for compensatory damages otherwise provided by law, for physical **abuse** or neglect, there are no facts to support such a claim here. Accordingly, there is no valid claim for such damages may be brought by or on behalf of Garat. [W&IC § 15657.5](#) does not itself provide a remedy of recovery of compensatory damages.

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